(3)

FILED
AUG 24 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-95

In The

Supreme Court of the United States

October Term, 1997

KEY BANK NATIONAL ASSOCIATION
f/k/a KEY BANK OF NEW YORK,

Petitioner,

vs.

RONALD P. MILHAM, BENEDETTA MILHAM
and ANDREA E. CELLI,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

RICHARD L. WEISZ
Counsel of Record
GEORGE W. CREGG, JR.
HODGSON, RUSS, ANDREWS,
WOODS & GOODYEAR, LLP
Attorneys for Petitioner
Three City Square
Albany, New York 12207
(518) 465-2333

148200

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

Lutz Appellate Services, inc.

14 pp

QUESTION PRESENTED

Whether an oversecured creditor of a Chapter 13 Debtor is entitled to be paid its contract rate of interest after confirmation of the Debtor's Chapter 13 Plan where the collateral is personal property such as a motor vehicle?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Cited Authorities	iii
I. *United States v. Ron Pair* Does Not Preclude An Interpretation Of § 506(b) That Mandates Contract Rate Of Interest After Confirmation	1
II. *Rake v. Wade* Left Open The Issue Of The Rate Of Interest Post-Confirmation	1
III. Legislative History Is Not Clear	2
IV. The Number Of Oversecured Claims In Chapter 13 Cases Is Increasing For Key Bank	3
V. Milham And Smithwick Are Incompatible	3
VI. Possible Revisions In The Bankruptcy Code Do Not Deal With 11 U.S.C. § 1325(a)(5)(B)(ii) And These Legislative Changes Will Not Moot The Decision	4
VII. The Conversion Of The Milhams' Case To Chapter 7 Does Not Moot The Matter	4
Conclusion	7

TABLE OF CITED AUTHORITIES

Cases Cited:

	Page
Green Tree Financial Servicing v. Smithwick, 202 B.R. at 423 (S.D. TX 1996), *reversed*, 121 F.3d 211 (5th Cir. 1997)	2, 3
In re: Harko, 211 B.R. 116 (2nd Cir. BAP 1997)	5
Moore v. Ogilvie, 394 U.S. 814 (1969)	6
Murphy v. Hunt, 455 U.S. 478 (1982)	5
Nebraska Press Assn. v. Stuart, 427 U.S. 539 (1976)	6
Rake v. Wade, 508 U.S. 464 (1993)	1, 2
Sosna v. Iowa, 419 U.S. 393 (1975)	6
Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498 (1910)	6
United States v. Munsingwear, Inc., 340 U.S. 36 (1980)	5
United States v. Ron Pair Enterprises, Inc., 489 U.S. 235 (1989)	1

Table of Cited Authorities

Page

Statutes Cited:

11 U.S.C. § 109 (H.R. 3150) at Section 101) 4

11 U.S.C. § 506(b) 1, 2, 5

11 U.S.C. § 1325(a)(5)(B)(ii) 2, 3, 4

Other Authority Cited:

The House on June 10, 1998 passed the Bankruptcy Reform Act of 1998 (H.R. 3150) 4

APPENDIX

Appendix A — Open Accounts As Of December 10, 1997 ..... 1a

I.

UNITED STATES v. RON PAIR DOES NOT PRECLUDE AN INTERPRETATION OF § 506(b) THAT MANDATES CONTRACT RATE OF INTEREST AFTER CONFIRMATION

This Court in *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989), ruled that the Bankruptcy Code authorized the payment of post-petition interest on non-consensual oversecured pre-petition claims such as tax claims. This Court construed § 506(b) to provide an unqualified right to post-petition interest but limited recovery of attorneys' fees, costs and charges only if provided for in the agreement under which the claim arose. There is nothing in the decision that precludes interpreting § 506(b) to provide oversecured consensual lien creditors with interest both post-petition and post-confirmation. The issue is what rate of interest is the oversecured creditor entitled to after confirmation of the debtors' Chapter 13 Plan. Therefore, it is submitted, *United States v. Ron Pair* has no application to the issue raised in this case other than 11 U.S.C. § 506(b) favors oversecured lien creditors by awarding them post-petition interest.

II.

RAKE v. WADE LEFT OPEN THE ISSUE OF THE RATE OF INTEREST POST-CONFIRMATION

The debtor asserts that this Court's opinion in *Rake v. Wade*, 508 U.S. 464 (1993), limits the application of 11 U.S.C. § 506(b) to post-confirmation interest. However, it is submitted that the Court in *Rake v. Wade* expressly left open the question of the rate of post-confirmation interest when it noted that:

> Because the issue is not presented in this case, we express no view on the appropriate rate of interest

> debtors must pay on arrearages cured pursuant to 11 U.S.C. § 1322(b)(5).

Id. at 472, n.8.

Accordingly, it is submitted, the scope of § 506(b) has not been limited and the Court has yet to rule on the issue presented for review, i.e. whether the oversecured creditor is entitled to contract rate of interest post-confirmation of the debtors' Chapter 13 plan.

III.

LEGISLATIVE HISTORY IS NOT CLEAR

The debtors assert that Congress has considered and rejected an amendment which would require the payment of interest at the contract rate of interest for present value purposes, citing *Green Tree Financial Servicing v. Smithwick*, 202 B.R. at 423 (S.D. TX 1996). However, this decision was *reversed* by the Fifth Circuit Court of Appeals at 121 F.3d 211 (5th Cir. 1997) and this Court denied certiorari sought by the debtor. There is no mention of Congressional intent or legislative history in the Fifth Circuit's decision. The Court rejected the Bankruptcy Court's award of post-confirmation interest calculated at 2% over prime rate on the day of the filing of the petition in favor of the contract rate unless the debtor came forward with evidence that the creditor's current rate is less than the contract rate (*Id.* at 89). The Fifth Circuit would also allow a creditor to present evidence justifying a post-confirmation rate higher than contract rate if rates had gone up (*Id.* at 89). Therefore, it is submitted, Congressional intent is not controlling even if it was discernible from the legislative history of 11 U.S.C. § 1325(a)(5)(B)(ii).

IV.

THE NUMBER OF OVERSECURED CLAIMS IN CHAPTER 13 CASES IS INCREASING FOR KEY BANK

The debtors assert that the number of oversecured claims in Chapter 13 cases is declining because more consumers are leasing cars. It is submitted that the increasing number of car leases does not necessarily support the debtors' contentions. Prior to the Milham bankruptcy filing in 1996, Key Bank rarely faced Chapter 13 borrowers whose car value exceeded the Key Bank lien. However, Key Bank now has over 30 cases pending in the Northern District of New York at Albany in which a debtor seeks to cram down Key Bank's oversecured claim (*see* Appendix "A"). It is the exploding number of Chapter 13 bankruptcies that are causing the increase in the frequency of debtors attempting to cram down oversecured claims, not the relative number of car leases versus loans.

V.

MILHAM AND *SMITHWICK* ARE INCOMPATIBLE

The debtors assert that the Second Circuit's decision in *Milham* and the Fifth Circuit's decision in *Smithwick* are not inconsistent. *Smithwick* holds that the secured creditor is entitled to a rebuttable presumption that the contract rate is the proper rate of interest under § 1325(a)(5)(B)(ii). If the prevailing interest rate was markedly lower than contract, the presumption might be overcome.

The Second Circuit's holding in *Milham* ignores the contract rate and prevailing market rates for car loans. The Second Circuit applies the treasury rate plus 1% to 3% to reflect higher risk. The two approaches are inconsistent and lead to different interest rates post-confirmation.

Therefore, the debtors' assertion that there is no conflict between the Circuits is not supported by the decisions themselves.

VI.

POSSIBLE REVISIONS IN THE BANKRUPTCY CODE DO NOT DEAL WITH 11 U.S.C. § 1325(a)(5)(B)(ii) AND THESE LEGISLATIVE CHANGES WILL NOT MOOT THE DECISION

The debtor submits that three competing bills in the House of Representatives and one bill in the Senate "could moot the decision of this Court if certiorari is granted." The House on June 10, 1998 passed the Bankruptcy Reform Act of 1998 (H.R. 3150). That bill, as amended, does not make any changes to 11 U.S.C. § 1325(a)(5)(B)(ii). The Senate has delayed further action on its bill (S 1301) until after the August recess.

The House bill does not contain any amendment to 11 U.S.C. § 1325(a)(5)(B)(ii). Therefore, the proposed legislature will not moot the Court's decision. In fact, if the provisions in the House bill making Chapter 13 the required chapter for many filings (*see* proposed amendment to 11 U.S.C. § 109 (H.R. 3150) at Section 101), there will be many more Chapter 13 filings and the importance of this Court resolving the split in the Circuit Court of Appeals over the meaning of 11 U.S.C. § 1325(a)(5)(B)(ii) will be magnified.

VII.

THE CONVERSION OF THE MILHAMS' CASE TO CHAPTER 7 DOES NOT MOOT THE MATTER

The debtors assert that the conversion of their case from Chapter 13 to Chapter 7 moots the issue. An appeal becomes moot "when the issues presented are no longer 'live' or the

parties lack a legally cognizable interest in the outcome" (*Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (per curiam)). It is submitted that the issue is still open as between the Milhams and Key Bank. The Milhams assert that they have paid Key Bank in full through their Chapter 13 Plan. Key Bank disputes that it has received final payment. It asserts that it is still entitled to additional payments because the higher contract rate should have been applied (Key Bank also will have a claim for attorneys' fees allowed under 11 U.S.C. § 506(b) in the Chapter 7 case, but that is not present before the Court). Key Bank therefore asserts that it still has a lien on the car while the Milhams assert that the car is free of Key Bank's lien. Accordingly, it is submitted, the issue of appropriate interest rate post-petition is still alive and the parties do have a legally cognizable interest in the outcome.

Furthermore, the Milhams' case was appealed with a companion case (*In re: Harko*, 211 B.R. 116 (2nd Cir. BAP 1997)). The issues were the same and the Bankruptcy Appellate Panel decided both cases together. For administrative reasons, the Second Circuit accepted oral argument in the *Milham* case with the *Harko* case to be bound by the outcome in *Milham*. If the Milham case is moot, through no fault of Key Bank, then this Court must reverse or vacate the Second Circuit Court of Appeals decision in *Milham* and remand with direction to dismiss. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1980). This will leave the *Harko* case with an adverse decision against Key Bank. Therefore, this Court's decision on the substantive issue of the case is not moot because the *Harko* case is still pending and the Harkos have not converted to Chapter 7.

In addition, in lieu of multiple appeals, the local Bankruptcy Court has confirmed a number of Chapter 13 cases in which debtors sought to cram down Key Bank's oversecured

claim with a provision in the Order of Confirmation that the treatment of Key Bank's claim will be amended if Key Bank is successful in the Milham/Harko appeals. A partial list of the cases containing the provisions in the Order of Confirmation is annexed hereto as Appendix "A". Thus, the Milham case is representative of a number of other similarly situated cases and this Court has jurisdiction to decide the issue (*see* for example, *Sosna v. Iowa*, 419 U.S. 393 (1975)).

Finally, it is submitted, this case represents an exception to the general rule on mootness because it is an issue capable of repetition yet evading review. *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969) citing *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, 515 (1910). The appeals in the *Milham* case have been expeditiously prosecuted. Even so, if this Court accepts this case for certiorari, it will be over two and a half years from the date of confirmation before the decision would be forthcoming. Many Chapter 13 cases, such as the Milhams, will have paid out the claim of the oversecured creditor as provided for in the confirmed plan before this Court could rule on the issue. Other debtors, again like the Milhams, will abandon their Chapter 13 cases before this Court could rule on the decision. Since no one can predict which Chapter 13 case would still be open with unpaid oversecured balances, Key Bank would have to appeal every case, and not know if any case would survive long enough for this Court's review. For this reason, it is submitted that the matter rests within the exception to the general rule on mootness. *See Southern Pacific Terminal Co. v. Interstate Commerce Commission*, *supra*; *see also Nebraska Press Assn. v. Stuart*, 427 U.S. 539 (1976).

CONCLUSION

The Second Circuit's decision conflicts with the Fifth Circuit in its holding, and conflicts with the Third, Fourth, Sixth and Tenth Circuits in its rationale. The case is not moot because the Milhams and Key Bank still dispute the balances due on the lien. Pending litigation does not address the issues of post-confirmation rate of interest in Chapter 13 cases where the collateral is personal property. If anything, the pending legislation will, if enacted, result in more Chapter 13 cases and make this Court's review more important. Petitioner Key Bank National Association therefore asks this Court to accept this case and reverse the Second Circuit's decision below.

Dated: August 24, 1998

Respectfully submitted,

RICHARD L. WEISZ
Counsel of Record
GEORGE W. CREGG, JR.
HODGSON, RUSS, ANDREWS,
WOODS & GOODYEAR, LLP
Attorneys for Petitioner
Three City Square
Albany, New York 12207
(518) 465-2333

APPENDIX

APPENDIX A — OPEN ACCOUNTS AS OF DECEMBER 10, 1997

Name	Date/Objection	Case No.
Andrew, Mark R. and Sandra J.	07/21/97	97-10694
Aney, Tina M.	04/07/97	97-10298
Berger, Gary G. and Karen S.	10/27/97	97-15550
Bielawa, Patricia	11/25/96	96-15219
Bohen, Robert Edward and Suzanne	05/12/97	97-11590
Bombardier, Suzanne M. and Joseph E. Jr.	11/10/97	97-16001
Brown, Robert R. and Denise Marie	07/17/97	97-13827
Campo, Ralph J. Jr. and Phyllis	04/07/97	97-11113
Dearstyne, Joseph and Katherine	07/95	95-12149
DeJohn, Bernard	01/13/97	96-14868
Donato, Melissa Ann	04/07/97	97-10170
Derby, Carl J. and Barbara E.	02/13/97	96-15925
Endrai, Eva	08/96	96-12266
German, James L. and Lenora R.	04/07/97	95-11230
Godfroy, William and Patricia	12/05/97	97-16389
Guerro, Denise	05/28/97	97-12478
Guthrie, Pearl M.	05/21/97	97-12171
Howard, Susan	08/96	96-14031
Jones, Vera	04/07/97	97-11109
Kyer, Donald H. and Judy A.	02/20/97	96-15133
Mahr, Robert P. and Kathleen M.	05/12/97	97-12160
Marcinka, Lucille M.	06/95	95-11154
McCormick, Kevin B.	06/10/96	96-11345
McGrath, Peter V. and Mary	06/16/97	97-11695
Pelletier, Erik G. and Stephanie L.	07/11/95	96-50030
Petalino, Steven	03/27/97	97-10863
Soucia, Thomas D. and Peggy J.	04/07/97	97-10452
Spazioso, Anthony J. and Mary B.	07/21/97	97-13726
Soroka, Patrick M. dba Rick's Cafe	09/03/96	96-13638
Underwood, Howard C.	01/13/97	96-16286